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1 BEFORE THE CITY OF CHICAGO POLICE BOARD
2 IN THE MATTER OF:)
3 CHARGES AGAINST)
4 SGT. DUANE A. BENNETT,) No. 13 PB 2827
5 Respondent.)

7 30 North LaSalle Street
8 Suite 1220
9 Chicago, Illinois 60602

10 July 15, 2013
11 12:00 o'clock p.m.

13 PRESENT: Ms. Jacqueline A. Walker, Hearing Officer
14 Mr. Max Caproni, Executive Director
15 Mr. Patrick Polk,
16 Assistant Corporation Counsel,
17 on behalf of the Superintendent;
18 Mr. Daniel Herbert,
19 on behalf of the Respondent.

21 REPORTED BY: DANIEL M. PRISCU, CSR
22 License No. 084-003982
23
24

1 test are not in dispute.

2 Sergeant Bennett's initial screening test
3 was positive for marijuana metabolites, and his
4 confirmation test found 33 ng/mL of one specific
5 marijuana metabolite in his urine, THC-COOH, which
6 is also known as THC-Acid, or THC-A.

7 Sergeant Bennett violated Chicago Police
8 Department Rules of Conduct Rules 1, 2 and 6. He
9 should be separated from the Chicago Police
10 Department for his violations.

11 The 33 ng/mL confirmation test result was
12 well above the threshold for a positive test. This
13 is not a borderline test result. It is over two
14 times the minimum threshold of 15 ng/mL.

15 The thresholds for what constitutes a
16 positive test are based on federal guidelines, the
17 SAMHSA standards.

18 You heard testimony from two different
19 witnesses who said that the SAMHSA guidelines are
20 the standard used in a wide variety of settings,
21 including the Department of Transportation
22 regulations. These thresholds were specifically
23 chosen in order to avoid false positive test
24 results.

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1 **HEARING OFFICER WALKER:** The first matter
2 before the Police Board today is that of Sergeant
3 Duane A. Bennett, case number 13-2827.

4 **MR. POLK:** Patrick Polk for the
5 Superintendent.

6 **MR. HERBERT:** Good afternoon, Dan Herbert
7 on behalf of Duane Bennett, who is present, as well.

8 **HEARING OFFICER WALKER:** We are in the
9 continued hearing in this matter.

10 The Department has last rested on its
11 rebuttal, and we are now ready for closing
12 arguments. Mr. Polk, please.

13 **MR. POLK:** Thank you, Hearing Officer
14 Walker.

15 Members of the Board, Counsel, while there
16 has been some complicated testimony about scientific
17 drug testing techniques and scientific studies, this
18 case is quite simple. Sergeant Bennett tested
19 positive for marijuana and should be separated from
20 the Chicago Police Department.

21 First of all, the positive test for
22 marijuana has been stipulated to. It is uncontested
23 that Sergeant Bennett tested positive for marijuana.
24 The collection, chain of custody and validity of the

1 Dawn Hahn from Quest Diagnostics testified
2 that the SAMHSA guidelines are actually the highest
3 thresholds that her lab uses for marijuana testing,
4 and that other clients of hers use cutoffs that are
5 stricter than what the Chicago Police Department
6 uses. That's on page 35 of the transcript.

7 Dr. Shirley Conibear, a certified Medical
8 Review Officer, testified that the result was not an
9 extremely small amount.

10 Next, the initial test and the
11 confirmation test are consistent with each other.
12 On its face, it may appear that the results of the
13 initial test and the confirmation test were
14 inconsistent, but this is not the case.

15 The initial test, the enzyme immuno-assay,
16 found that there were at least 50 ng/mL of marijuana
17 metabolites in Sergeant Bennett's urine sample.
18 This measurement was for the total amount of several
19 different marijuana metabolites.

20 After the initial screening test was
21 positive, the confirmation test, gas
22 chromatography/mass spectrometry, or GC/MS, was
23 performed.

24 This confirmation test found 33 ng/mL of

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1 one specific marijuana metabolite in Sergeant
2 Bennett's urine. That metabolite is, again, THC-A,
3 or THC-Acid.

4 As you heard in the testimony, GC/MS is
5 the gold standard used throughout the industry for
6 drug tests.

7 The two tests are consistent because they
8 use different technology and test for different
9 things. The first test was testing for multiple
10 metabolites, while the second test was only testing
11 for one specific metabolite.

12 Next, the environmental exposures that
13 Sergeant Bennett listed would not have caused his
14 positive drug test.

15 Sergeant Bennett provided four different
16 scenarios in which he could have been exposed to
17 secondhand marijuana; however, none of these
18 exposures could have possibly resulted in his
19 positive drug test.

20 First was his son's room. This happened
21 late at night or early in the morning before he had
22 his drug test, approximately eight hours before his
23 test.

24 He initially reported to the Internal

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1 for six straight days.

2 The author of the articles, in talking
3 about the 16-cigarette condition said "it seems
4 improbable that subjects would unknowingly tolerate
5 the noxious smoke conditions produced by this
6 exposure." That's Superintendent 7, page 89.

7 The same article also said that,
8 "Visually, smoke accumulation in the room during the
9 combustion of 4 marijuana cigarettes was light to
10 moderate, but was very heavy during the combustion
11 of 16 marijuana cigarettes. The amount of smoke in
12 the room after the burning of 16 cigarettes was
13 noxious to the mucous membranes of the eye and nose
14 when exposed over a prolonged period of time."
15 That's Superintendent 7, page 91.

16 And, finally, it also said that "Based on
17 their, 'their' being the test subjects, comments, it
18 seems unlikely that exposure to the smoke of 16
19 marijuana cigarettes without eye goggles would have
20 been tolerable for most subjects for extended
21 periods of time." Superintendent's 7, page 95.

22 Also, in those experiments, as soon as the
23 door to the test room was opened, the levels of THC
24 in the air dropped by over 90 percent.

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1 Affairs that he only smelled marijuana, but he
2 testified at the hearing that he also saw smoke.
3 That's on page 120 of the transcript.

4 He said that the room was approximately 10
5 feet by 12 feet by 6.5 feet. He said that there
6 were air conditioning ducts in the room. He
7 testified that he was in the room for approximately
8 20 to 30 minutes. None of these factors are
9 consistent with the extreme exposure that would
10 result in a positive urine test.

11 Sergeant Bennett's expert, Dr. O'Donnell,
12 based his opinion in part on the scientific
13 literature on secondhand marijuana smoke, but these
14 studies do not support his opinion.

15 Our expert, Dr. Conibear, discussed how
16 these articles showed how even extreme exposure
17 would result in low levels of THC metabolites in the
18 urine.

19 In those studies, the subjects were in a
20 room that was 8.21 by 6.83 by 8 feet. It was
21 approximately the size of a small bathroom. The
22 room had no ventilation. A machine smoked either 4
23 or 16 marijuana cigarettes over the course of an
24 hour, and the subjects were exposed to this smoke

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1 Even when they were in the room with a
2 machine that smoked four marijuana cigarettes over
3 the course of an hour for six days in a row, the
4 highest THC-A concentration found in their urine was
5 12 ng/mL. Sergeant Bennett's THC-Acid level was
6 almost three times that.

7 In the even more extreme experimental
8 condition of 16 marijuana cigarettes, the maximum
9 level of THC-Acid was, in fact, higher than Sergeant
10 Bennett's and peaked at 87. But in that condition
11 the smoke was so thick in the air that they had to
12 wear goggles, and they were in that bathroom-sized
13 room for one hour a day for six straight days.

14 Clearly, this is nothing like the scenario
15 that Sergeant Bennett described. He initially
16 reported that he merely smelled marijuana and didn't
17 report seeing any smoke at all. There was no
18 marijuana actively being smoked while he was in the
19 room.

20 He certainly did not testify that he had
21 to wear goggles just to walk in the room. His son's
22 room was also much larger than the room in the
23 experiments, and it had ventilation. He was only in
24 the room for 20 to 30 minutes, and he did not have

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1 repeated exposure on successive days.

2 Clearly, the conditions that Sergeant
3 Bennett described are nowhere near as extreme as the
4 conditions in the experiment.

5 Next was the concert. He attended an
6 outdoor concert on June 27th, 13 days before his CPD
7 drug test. It was outdoor. He was not trapped in a
8 small room with multiple marijuana cigarettes
9 burning without any ventilation.

10 Again, the study showed that THC
11 concentration in the air was reduced by over
12 90 percent when just the door was opened.

13 Additionally, this concert occurred 13
14 days before his drug test, which is over eight times
15 the half life of marijuana metabolites. When a
16 chemical has a half life, that means that it decays
17 at an exponential rate. In this case, it means that
18 the THC metabolite levels from the exposure would
19 have been reduced to less than one-half of 1 percent
20 of their initial level by the time he had his CPD
21 drug test.

22 Any secondhand exposure, even if it was
23 far higher than what was reported in the articles we
24 discussed, would have been undetectable by the time

1 system when he took the test. This exposure could
2 not have led to his positive test result.

3 Finally, there is the evidence locker. He
4 testified that the marijuana was in a sealed bag in
5 a closed safe. The marijuana not burning. As you
6 heard from Dr. Conibear, merely smelling unburned
7 marijuana cannot result in a positive drug test.

8 The volatilized particles, the particles
9 you can smell, do not contain any THC whatsoever.
10 That's found in Superintendent's Exhibit 8. That
11 means that this exposure could not possibly result
12 in THC being detected in his urine.

13 Opposing counsel and his expert,
14 Dr. O'Donnell, attempted to show that each of these
15 four exposures could have had a cumulative effect
16 that resulted in a positive test.

17 As Dr. Conibear testified, the only
18 relevant exposure was when he went into his son's
19 room the night before his CPD test, and that was
20 much too small of an exposure to account for his
21 positive results.

22 As I just said, the evidence locker had no
23 impact at all because it was only the odor of
24 non-burning marijuana, which does not contain THC,

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1 he had his test.

2 Again, the scientific literature does not
3 support finding that such a remote and minimal
4 secondhand exposure would result in a positive test.

5 Next was the tire shop. This happened in
6 late June, so it was at least ten days before his
7 CPD drug test. Again, he initially reported that he
8 merely smelled an order of marijuana, but he
9 testified at the hearing that he saw smoke in the
10 room on page 124.

11 He testified that the room was
12 approximately 15 feet by 4 feet by 8 feet, compared
13 to the smaller room used in the two scientific
14 studies. He also testified that he was in the room
15 for approximately half an hour.

16 Just like the outdoor concert, this
17 exposure is much too remote and much too minimal to
18 have any impact on his CPD drug test. He was not in
19 the room while marijuana was being smoked. He did
20 not have prolonged or repeated exposure to the room.

21 Furthermore, it occurred at least ten days
22 before his test, which means it was at least six
23 half lives, which means so that at most there was
24 only about 1.5 percent of this exposure left in his

1 and the outdoor concert and the tire shop incidents
2 both occurred more than ten days before his drug
3 test, and so too much time had passed.

4 Sergeant Bennett had additional drug tests
5 performed after he tested positive for marijuana
6 with the CPD; however, the test themselves are
7 suspect, and even if they were valid, they do not
8 have any relevance as far as Sergeant Bennett's
9 July 10, 2012, test with the Police Department.

10 As you heard from Dr. Conibear, the July
11 16, 2012, urine test performed at the Adult Primary
12 Care Center does not support Sergeant Bennett's
13 case. It does not adequately document the
14 collection of the sample, that the sample was
15 unadulterated or the chain of custody. There is no
16 specimen collection affidavit and no certifying
17 scientist; however, even if the tests were valid,
18 they have no bearing on Sergeant Bennett's charges.

19 As you heard from Dr. Conibear, the test
20 was taken six days after the initial test, which is
21 too far removed.

22 The hair test also has no bearing on the
23 current charges. Sergeant Bennett's own expert,
24 Dr. James O'Donnell, testified that he would not

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1 expect a positive hair test from a single exposure
2 to marijuana. That's on page 56 of the transcript.

3 As Dr. Conibear explained, hair tests are
4 good at detecting repeated use of marijuana, but
5 even a single large dose would not necessarily
6 result in a positive hair test.

7 Sergeant Bennett is not charged with
8 habitually using marijuana. We are not trying to
9 prove that he used it multiple times. He is charged
10 with testing positive for marijuana on July 10,
11 2012.

12 In conclusion, as I said at the outset,
13 while there's a lot of scientific evidence involved,
14 this case is quite simple. Sergeant Bennett tested
15 positive for marijuana and violated Rules of Conduct
16 Numbers 1, 2 and 6.

17 The Superintendent cannot tolerate this
18 sort of misconduct, and Sergeant Bennett should be
19 separated from the Department.

20 **HEARING OFFICER WALKER:** All right. Thank
21 you, Mr. Polk.

22 Mr. Herbert?

23 **MR. HERBERT:** Thank you.

24 Madam Hearing Officer, opposing Counsel,

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1 Ladies and Gentlemen of the Board, I represent Duane
2 Bennett in this case, and I believe this is a case
3 that needs to be looked at in the full context.

4 As Mr. Polk stated in his closing, there
5 is no dispute that there was a drug test in excess
6 of the minimal threshold amount. That evidence has
7 been stipulated to.

8 However, when I talk about the context in
9 this case, the context shows that this was the
10 result of a false positive or, more specifically,
11 environmental exposure.

12 To begin we know, thanks to the City's
13 expert witness, Dr. Conibear, that more than
14 50 percent of the Chicago Police Department drug
15 tests that result in a positive finding, more than
16 50 percent of those are based not on the legal
17 conduct of the donor. That's undisputed. That's
18 the City's evidence.

19 So what that tells us is that it's more
20 likely than not in this case that Sergeant Bennett's
21 positive result was based on something that was not
22 illegal conduct, specifically, environmental
23 exposure.

24 Even if we looked at the City's case in

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1 every single light most favorable and discounted
2 every piece of evidence to support our explanation
3 in this case that it's environmental exposure, we
4 take the City's argument 100 percent at face value,
5 even if we were to do that, what the Board would
6 have to believe is that Duane Bennett decided one
7 day to go out and smoke a lot of marijuana and then
8 got caught with a positive drug test, because its
9 undisputed that we know Duane Bennett -- we can rule
10 him out as a chronic user. Both experts have said
11 that based upon the results of this case.

12 So, therefore, we have to look at this,
13 and if the Board is to fire Duane Bennett and find
14 him guilty of intentionally exposing himself to
15 marijuana, we would have to believe that Duane
16 Bennett made this decision to go out and get really
17 high one particular evening.

18 I would suggest that the Board can
19 certainly review the testimony of Duane Bennett and
20 determine if that is a likely scenario or if it's
21 more unlikely.

22 Duane Bennett's is a 49-year old man who
23 has honorably served the City for 22 years. His
24 complimentary history is in evidence, and it's by

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1 all means an excellent history. He has over 50
2 awards. He has no discipline in his background, 22
3 years.

4 This is a man that's not only been a good
5 police officer, that has been promoted to sergeant
6 and has been an excellent sergeant, he's a great
7 family person, raised his kids, volunteered in the
8 community, a community in which he grew up in.

9 The bottom line is, and more to the point,
10 this is also a person that has taken dozens of drug
11 tests over his 22 year career and has passed every
12 one of those.

13 So in order to find to Duane Bennett
14 guilty, the Board would have to believe that he just
15 made this one horrible decision one night and went
16 out and got high and the City was lucky enough to
17 catch him with a positive drug test done a few days
18 afterwards.

19 Well, the more likely scenario, the more
20 likely explanation for that is what Duane Bennett
21 has stated from day one. Mind you, this is not a
22 case where somebody has come in and has given
23 multiple explanations.

24 Duane Bennett's explanation before the

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1 Board was exactly the same as it was when he first
2 was identified of the positive drug test at Internal
3 Affairs. It's basically there has to be a mistake.
4 We know there's mistakes. The City admitted there's
5 mistakes. There has to be a mistake. There has to
6 be another explanation for that.

7 Well, there was another explanation for
8 that, and Dr. O'Donnell, the expert in this case, he
9 testified unequivocally that based upon his review
10 of this case that it was absolutely more likely than
11 not that Duane Bennett's positive test result was a
12 result of environmental exposure and not of any
13 intentional conduct of Duane Bennett.

14 Now, the City has offered an expert, as
15 well, and I will get to the City's expert. But,
16 essentially, this is a case that really lay people
17 have difficulty making a decision on, and that's why
18 expert examination or expert testimony is required
19 in these types of cases.

20 Mr. Polk, during his closing argument,
21 made a number of comments about how the exposures
22 that Mr. Bennett talked about, they couldn't have
23 caused this, and they couldn't have risen to a level
24 of 33 ng's.

1 qualified expert to render an opinion in this case.
2 He's published five books on pharmacology. He's
3 interpreted urine drug test results for the past 35
4 years. And his knowledge and his expertise in
5 interpreting drug test results far exceeds
6 Dr. Conibear's expertise, if she does have an
7 expertise in that field.

8 Dr. Conibear, she is a Medical Review
9 Officer. That is her job. Her client in this case
10 is the City of Chicago, the Chicago Police
11 Department. She is paid \$550 an hour by the Chicago
12 Police Department to support the theory of the case
13 that the Police Department wants supported.

14 The Police Department brought charges in
15 this case. The Superintendent has brought charges
16 that Duane Bennett's illegally used marijuana, which
17 resulted in a positive test, and not coincidentally
18 the City's employee, her client, Dr. Conibear, has
19 opined in a way that supports the Police
20 Department's decision.

21 Well, when we look at Dr. Conibear's
22 testimony compared to that of Dr. O'Donnell, it's
23 clear that Dr. Conibear is not as familiar with the
24 interpretation of drug tests, specifically with

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1 Well, it's important to recognize that
2 those are all Mr. Polk's opinions, and those are not
3 opinions that are supported by expert evidence in
4 this case. They were completely contradicted by
5 Dr. O'Donnell's testimony, and they weren't even
6 supported by the City's expert. I will explain that
7 in a minute.

8 But, first, if we want to compare the two
9 experts, I think that it's going to be quite clear
10 that Dr. O'Donnell was by far the more qualified
11 person to render an opinion in this case before us.

12 Dr. O'Donnell's history and his background
13 is in pharmacology. He has been a pharmacist since
14 1969. 44 years he has served in this field.

15 Moreover, his professional background, he
16 regularly consults with law enforcement agencies.
17 He testifies for police departments, for employers.
18 The significance of that is Dr. O'Donnell is clearly
19 not what is referred to by some experts as a hired
20 gun, somebody that comes out and testifies for one
21 sides.

22 This is an individual whose reputation and
23 his background in the field, they're impeccable.

24 I would state there is not a more

1 marijuana, and that's not surprising when you look
2 at the backgrounds of these two experts.

3 Dr. O'Donnell explains at length about the
4 half life issue was made a big issue, or
5 Dr. Conibear attempted to make that a big issue
6 showing how Sergeant Bennett's explanations of
7 exposure are not plausible.

8 Well, what she doesn't take into account,
9 and, again, it's not unusual, based upon her limited
10 knowledge of marijuana and urine drug tests, she
11 doesn't take into account the fact that marijuana
12 has several metabolites, as Dr. O'Donnell testified
13 to, and that they have longer half lives, these
14 metabolites in marijuana.

15 He talks about specifically how can these
16 half lives, how are they adjusted, how do they not
17 fit into the neat package that Dr. Conibear wants
18 this Board to believe is a universal explanation for
19 half lives.

20 Well, the fact of the matter is
21 Dr. O'Donnell talked about marijuana goes into the
22 fat and it's stored in the fat, and he specifically
23 said because it is highly lipophilic, and that's on
24 page 44 and 45 of the transcript of Dr. O'Donnell.

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1 He talks about how detection for marijuana
2 in a subsequent drug test can be as long as 7 days,
3 14 days 30 days after exposure. Why is that?
4 Because of the fact that the metabolites get
5 introduced into the fact.

6 Dr. Conibear does not talk about that in
7 any way because Dr. Conibear does not have the
8 expertise that Dr. O'Donnell has, and that is 35
9 years of interpreting urine drug screen tests.

10 During his time, his 30 years, he has
11 interpreted close to 1,000 urine drug screens.
12 That's on page 47 of his transcripts. He's
13 testified as an expert over 350 times on questions
14 of urine drug screens.

15 Page 49, his testimony is equally divided
16 between the employer and employee, prosecution and
17 defendant.

18 But more significant than the unquestioned
19 expertise of Dr. O'Donnell vis-a-vis Dr. Conibear's,
20 more significant is the emphasis and the work that
21 was done that went into formulating their respective
22 opinions in this case.

23 Dr. O'Donnell did what an expert is
24 supposed to do, and that is he looked at the

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1 a number of reasons. One, she simply doesn't have
2 the expertise in pharmacology that Dr. O'Donnell
3 does. She's a Medical Review Officer that reviews a
4 number of different situations, only a small
5 percentage of those which contained positive drug
6 tests.

7 More telling is Dr. Conibear prepared a
8 report in this case. The report was to support her
9 opinion, and her opinion, as she testified to, was
10 that the positive drug test of Duane Bennett could
11 not have been caused by environmental exposure.

12 Well, I think it's significant to note
13 that, first of all, the report that was prepared by
14 this doctor, Dr. Conibear, was never introduced into
15 evidence. Why wasn't it introduced into evidence?
16 Because it's flawed.

17 We know it's flawed because on
18 cross-examination Dr. Conibear admitted that it was
19 flawed. The most important sentence, the most
20 important portion of her report, she admitted she
21 made mistakes on those. The purpose of doing a
22 report was to opine on whether or not it was
23 environmental exposure that more likely caused the
24 positive drug test.

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1 exposures. He looked at the drug tests. He looked
2 at the subsequent drug test that was negative. He
3 look at the subsequent hair test that was negative.
4 He interviewed the donor. He took every piece of
5 evidence, every piece of explanation into his
6 equation when he made his decision.

7 Dr. Conibear even admitted his opinion was
8 more informed than hers. It was more informed than
9 hers because Dr. O'Donnell has a reputation in this
10 community, and he is not going to give a positive
11 opinion for an individual that is not supported by
12 the evidence.

13 The evidence supported Dr. O'Donnell's
14 opinion, and that is that it was more likely than
15 not environmental exposure versus that of
16 intentional conduct by Duane Bennett.

17 Let's get into Dr. Conibear and her
18 testimony. She is a hired gun for the City.
19 There's no question about that. The City is her
20 client. She gets up here to testify in support of
21 how the City brings charges in this case.

22 Well, Dr. Conibear's knowledge in this
23 case and her opinion in this case is flawed.
24 There's no question about that. And it's flawed for

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1 When I asked her, when I confronted her
2 about the opinions she expressed in her report,
3 specifically, I'll talk about I spoke with her about
4 the opinion she expressed in paragraph one, how she
5 talks about it's possible to absorb THC through
6 environmental exposure, but not at the threshold
7 levels that was found in Sergeant Bennett urine, 33
8 ng/mL's.

9 When I asked Dr. Conibear how she came to
10 that conclusion, it was clear. The only evidence,
11 the only support, the only basis for Dr. Conibear's
12 opinion was the document that Dr. O'Donnell cited as
13 one of the examples or one of the bases for his
14 opinion.

15 Dr. Conibear, every single answer she
16 gave, was, well, that's what I think because that's
17 what the report says. That's what this study says.
18 Well, it says that in that document.

19 Well, it didn't say what she believed it
20 said on many occasions because she simply either
21 misread the document or didn't read the document
22 completely, and she admitted to that on
23 cross-examination.

24 We further went down the report, when she

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1 talks, again, about how these levels, this minimal
2 threshold level of 15 ng was designed so that it
3 would absolutely eliminate the chance of
4 environmental exposure.

5 Well, I asked her what her basis for that
6 conclusion was. She stated it was because of the
7 report of that study that was done.

8 Well, I showed her that that study, in
9 fact, did not support that. It showed an individual
10 that had 79 ng's of marijuana in his system. And
11 then what did she do? She flip-flops. Okay. Well,
12 but, yes, that guy had 16 cigarettes in a room that
13 was being smoked. And I said, Well, in your report,
14 Doctor, you said that it was not possible. She
15 said, Well, I should have put in there that in
16 Sergeant Bennett's case it was not possible. But
17 she didn't do that.

18 She made the opinion that it was
19 absolutely physically impossible for a reading above
20 15 ng's from environmental exposure only. And we
21 know it's not a mistake in one sentence, as she
22 wants us to believe. It's throughout her entire
23 opinion, which is why the opinion is useless, which
24 is why it wasn't introduced into evidence.

1 says environmental exposure cannot reach that
2 threshold level. That's why that threshold level
3 was established, to eliminate environmental exposure
4 tests. She was wrong.

5 She goes on to further say it is possible
6 that environmental exposure could result in
7 absorption but not at the level found in Sergeant
8 Bennett's urine. Again, clear. She's not talking
9 about in Sergeant Bennett's case based upon the
10 exposures that he talked about it couldn't result in
11 that.

12 She said it absolutely could not result in
13 a 33 ng finding. She's wrong. She admitted she was
14 wrong. The literature completely supports that it
15 can exceed 15 ng's, exceed 33 ng's.

16 So the only basis that she relies on for
17 her opinion, she misinterprets it. And even if we
18 want to look at that study, that's why Dr. O'Donnell
19 is the more qualified expert here.

20 Dr. O'Donnell didn't just read four sheets
21 of paper and come up with a conclusion. He based it
22 on his 35 years in the field, and he used that
23 document as one of the bases for his opinion.

24 He was asked about, Well, doesn't it show

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1 She goes on to further talk about Sergeant
2 Bennett's drug screen on July 10, 2012, was more
3 than double this threshold in the confirmation test.
4 The medical literature does not support
5 environmental exposure alone as the cause for levels
6 above 15 ng of THC. That's completely wrong.

7 The evidence that Dr. Conibear was using,
8 the only piece of evidence that she used to support
9 her conclusion showed that that statement is
10 100 percent false.

11 And, again, when she was confronted with
12 that, she flip-flops, Oh, you're right. I should
13 have said in Sergeant Bennett's case. Well, she
14 didn't.

15 And she goes on to further describe later
16 in that sentence, This threshold level was purposely
17 chosen to exclude passive exposure as a cause of
18 positive test when the level was chosen by SAMHSA.

19 Well, when you read that sentence, what is
20 it more likely that she's saying? She's saying that
21 there's no chance environmental exposure can cause a
22 level above what SAMHSA has decided, or is she
23 saying, Well, in Sergeant Bennett's case that's what
24 it is. It's clearly the former. She unequivocally

1 these five people were in a room with somebody that
2 smoked six cigarettes, and they only rose to the
3 level of 6 ng's? Did Dr. O'Donnell say, Oh, you're
4 right. My opinion is wrong. I screwed up. He
5 said, no. That's what the study showed. But by no
6 means does that mean that in Duane Bennett's case
7 his positive test wasn't caused by environmental
8 exposure?

9 Why? For many reasons. He analyzed it as
10 a doctor analyzes these things. One, it's five
11 people. He said it was too small of a study to base
12 conclusive findings on. And, two, he looked at all
13 the other evidence in this case to determine his
14 opinion.

15 Specifically, Dr. Conibear, what did she
16 look at? Well, she didn't look at what
17 Dr. O'Donnell looked at. As a matter of fact, she
18 didn't follow the regulations that she is required
19 to follow, not that she's supposed to follow, not
20 that it's recommended that she follow, that she is
21 required to follow.

22 The Department of Human Health Services
23 and the Department of Transportation mandates that
24 the Medical Review Officer must interview the donor.

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1 She admitted that. She said she didn't do that in
2 this case. Why not, Doctor? Well, I read his IAD
3 statement. Okay. That's not enough. So did
4 Dr. O'Donnell. He read his IAD statement. He took
5 the time to interview the donor.

6 Why is it regulated by the Human Health
7 Services? Why is it regulated by the government?
8 Because it's important to find out every factor that
9 is relevant to a positive drug test.

10 But I think one of the most conclusive
11 factors that Dr. Conibear's opinion is respectfully
12 useless in this case is Dr. Conibear talks about she
13 clearly did not know the case with Duane Bennett.

14 She says on -- I believe it was on direct
15 examination, she talks about the differences between
16 the individuals in the study, Duane Bennett and the
17 one portion of the people in the study that had
18 multiple exposures, she says, and it's clear, and we
19 didn't have the transcript, so I don't know what
20 page it is, I had it written down, and I crossed her
21 on it, she said, Well, the donor in this case, Duane
22 Bennett, only had one such exposure.

23 Well, that's wrong. There were four
24 exposures. She clearly had the evidence wrong when

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1 judge whether or not Duane Bennett was making up
2 this story about a concert or not. Why? Because
3 that's not her job as a Medical Review Officer, one;
4 and, two, she never interviewed Duane Bennett. So
5 her discounting the other exposures shows that her
6 opinion was flawed because it wasn't based on the
7 evidence in this case.

8 And, moreover, her report and her
9 contradictions show that she clearly is giving
10 opinions that are absolutely contradicted by the
11 medical literature that she says supports her
12 conclusion.

13 She absolutely got it wrong when she
14 prepared the report, which is why it's not in
15 evidence. She got it wrong when she was up there
16 and testified when she tried to backtrack, but the
17 bottom line is she was wrong.

18 Who got it right? There's no question in
19 this case that Dr. O'Donnell did a thorough
20 examination. He is the most qualified person to
21 provide this opinion based upon his background, and
22 his opinion was clear, that it was more likely than
23 not the positive test was caused by environmental
24 exposure. Case closed. This expert, his testimony

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1 she realized when I confronted her with that, and
2 she realized that she had a wrong piece of evidence
3 to support her conclusion. Again, what did she try
4 to do? She tried to backtrack.

5 Well, does this like what a legitimate
6 doctor, a legitimate expert, would do?

7 Dr. O'Donnell talks about, Yes, I had to
8 take these reported exposures and determine whether
9 or not they could result in an environmental
10 exposure, a positive test resulting from an
11 environmental exposure.

12 What did Dr. Conibear do? She looked at
13 the -- she considered one of the four exposures, the
14 marijuana smoke in Duane Bennett's son's room. And
15 when asked her, I said, Well, you didn't consider
16 the other three exposures? No. Why not? When I
17 asked her about the concert, and you can remember
18 her answer, I believe, she discounted the concert.
19 Why? Well, everybody uses that excuse.

20 Okay. Maybe everybody does. But it
21 doesn't mean that it's false in Duane Bennett's
22 case. It doesn't mean that it's a made up story in
23 Duane Bennett's case.

24 And, moreover, she is not in a position to

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1 is reliable. This does not meet the preponderance
2 of evidence case based on his testimony.

3 But I think when we factor in the human
4 factor, the common sense factor, if the Board is
5 going to fire somebody for smoking marijuana, I
6 would hope that it would be convinced beyond any
7 doubt that this individual smoked marijuana. And in
8 this case, I believe that the evidence supports
9 exactly what Dr. O'Donnell said, that it was more
10 likely environmental exposure based upon Duane
11 Bennett, who he is, his long history of service to
12 the Police Department, his exemplary record, his
13 lack of any discipline in his background.

14 The bottom line is the evidence does not
15 support a finding that it was not environmental
16 exposure.

17 Conversely, the evidence supports that
18 this test result was a mistake, just like over half
19 of the test results conducted by the Police
20 Department. Unfortunately, this one got charged.

21 The bottom line is it's a mistake. Duane
22 Bennett would love to get back and start working as
23 a policeman and do the job that he's done
24 excellently for the last 22 years. Thank you.

1 THE COURT: Thank you, Mr. Herbert.
2 Anything further, Mr. Polk?

3 MR. POLK: Yes, very briefly.

4 First of all, counsel has talked about
5 this greater than 50 percent positives are not due
6 to illegal misconduct and cited that as if to show
7 that that means that this is a less than 50 percent
8 chance that it is actually misconduct, but that is
9 not true.

10 Dr. Conibear testified that she reviews
11 all of the positive drug test cases for the Chicago
12 Police Department, and she decides whether or not
13 it's a valid drug test. And she decides that in
14 greater than half the time it is due to a medically
15 explainable reason, and she testified specifically
16 that was due to medications.

17 And she is the one who decided that in
18 this case there was no medical reason that the test
19 was positive. There were no medications that caused
20 a false positive. And, in fact, no medication can
21 cause a false positive in a marijuana confirmation
22 test. And so she confirmed that this is not one of
23 those 50 percent of the cases, and that is actually
24 due to ingesting marijuana.

1 No. 3. And that article that he was using to claim
2 that this specific test result was due to
3 environmental factors did not contain any GC/MS
4 results whatsoever, and that only because we, the
5 Superintendent, brought in Superintendent's No. 7
6 that did contain the GC/MS study was Dr. Conibear
7 actually able to discuss specific GC/MS results, and
8 that wasn't even referenced in Dr. O'Donnell's
9 opinion. And, clearly, Dr. Conibear referred to
10 more information than Dr. O'Donnell.

11 Additionally, there were insinuations that
12 Dr. Conibear incorrectly interpreted the articles
13 that she was relying on, but that is simply not
14 true.

15 And, furthermore, it is obvious from the
16 record that Dr. O'Donnell critically misinterpreted
17 the only article that he relied on, Superintendent's
18 Exhibit No. 3.

19 I refer to page 75 of the transcript.

20 "Q Isn't it true that Table II only
21 tells of the number of positive tests and not
22 any measurement of nanograms per milliliter of
23 marijuana metabolite in the urine?

24 "A You are wrong, sir.

1 Also, this was a lot of comparison between
2 the two experts in this case. Opposing counsel has
3 said that Dr. O'Donnell is more qualified, his
4 testimony was clear, his opinion was clear, and gave
5 lots of reasons why Dr. O'Donnell was a more
6 trustworthy expert than Dr. Conibear.

7 However, first of all, he said that
8 Dr. O'Donnell used all the other evidence, as
9 opposed to the evidence that Dr. Conibear used.

10 However, both experts explicitly said what
11 they referred to when they formed their opinion.
12 Both relied on literature in general. Both relied
13 on the Chicago Police Department drug tests. Both
14 relied on the urine and hair tests. And the only
15 thing that Dr. O'Donnell did was personally
16 interview the donor, and that is the only thing that
17 Dr. Conibear did not do.

18 There's no other research or any other
19 studies that Dr. O'Donnell cited to support his
20 opinion, and, of course, the scientific literature
21 is the most reliable evidence to cite to when you're
22 forming a scientific opinion.

23 In fact, Dr. O'Donnell only cited to one
24 article, and that would be Superintendent's Exhibit

1 "Q So you're saying, for instance,
2 Subject A, 20 nanograms per milliliter, it says
3 3, and that means there's 3 nanograms per
4 milliliter in Subject A's urine?

5 "A Yes.

6 "Q So that's not 20 nanograms per
7 milliliter, is it? That's 3. 3 is less than
8 20, correct? Doesn't it say Table I, Urine
9 Samples Tested Positive for Cannabinoid
10 Metabolites by EMIT Assay after Passive
11 Exposure to Marijuana?

12 "A I was wrong. I was wrong. I
13 apologize for saying you were wrong. The
14 Subject A had was tested three times and had
15 three test results that exceeded that. The
16 total number of results was 23, but all of the
17 EMIT tests that were positive were tested with
18 using GC/MS according to the sentence that I
19 read at the bottom of page 252 in the right
20 hand column."

21 So Dr. O'Donnell critically misinterpreted
22 his own chart from the article that he cited to and
23 mistakenly thought that that was the GC/MS results,
24 which are the only results that are valid when

1 you're discussing a confirmation test. Clearly, he
2 didn't understand that.

3 Also, he was critically wrong when he
4 claimed that the exposure by the evidence locker
5 could possibly result in a positive marijuana test.

6 As Superintendent's 8 shows, non-burning
7 marijuana, the odor of marijuana does not contain
8 any THC and could not possibly result in a positive
9 test result.

10 He affirmatively stated on page 59 of the
11 transcript that, yes, just smelling marijuana could
12 result in a positive test.

13 Also, it was insinuated that Dr. Conibear
14 was incorrect because she failed to interview the
15 donor in this case. And, again, as she pointed out
16 on cross-examination, that is what the DOT
17 regulations require, but she does not have to
18 conform to those regulations for non-Department of
19 Transportation clients.

20 The City of Chicago Police Department is
21 not a Department of Transportation client, so she is
22 not required to interview candidates. And, of
23 course, the Chicago Police Department has its own
24 procedure.

1 She read the Internal Affairs interview
2 and got all of the reasons that Sergeant Bennett
3 provided and didn't have to do anything further.

4 Finally, Dr. Conibear did not ever
5 backtrack about there being one exposure that could
6 possibly result in the positive drug test. She very
7 clearly stated that she considered all four of the
8 scenarios that Sergeant Bennett described, but the
9 only one that was even possible to have impact was
10 the one that happened the night before his drug
11 test, because the others were too remote, and
12 smelling marijuana has no impact. She properly
13 considered all four, but she eliminated three of
14 them because they did not have an impact.

15 She did not ever backtrack. She was
16 consistent in testifying that that was her
17 reasoning. Thank you. Nothing else.

18 **HEARING OFFICER WALKER:** All right. Thank
19 you, Mr. Polk.

20 This matter will be taken under
21 advisement. It will be presented to the Police
22 Board when next it meets in Executive Session, and
23 at that time the Police Board will render its
24 decision. Thank you, both.

1 STATE OF ILLINOIS)
2 COUNTY OF COOK) SS.

3

4 DANIEL M. PRISCU hereby certifies that he
5 reported in shorthand the proceedings in the
6 above-entitled matter and that the foregoing is a
7 true and correct transcript of said proceedings.

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Certified Shorthand Reporter
C.S.R. Certificate No. 084-003982